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No. 03-95

IN THE

Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
Petitioner,

v.

NANCY DREW SUDERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) files this brief *amicus curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 64 national and international labor organizations with a total membership of approximately 13 million working men and women.

SUMMARY OF ARGUMENT

The affirmative defense delineated in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), is not available in a Title VII case where the plaintiff-employee proves that sexual harassment by her supervisor has culminated in the employee's constructive discharge.

I. In general terms, the *Ellerth/Faragher* affirmative defense is not available in cases where a supervisor's sexual harassment of a plaintiff-employee has culminated in a "tangible employment action." A "tangible employment action" is one which changes an employee's employment status in a way that inflicts economic injury, such as lost wages or benefits, as opposed to personal injury, such as pain and suffering or emotional distress.

The line drawn in *Ellerth* and *Faragher* accommodates the affirmative defense announced in those cases—which promotes the adoption and utilization of employer sexual harassment complaint procedures—with the general Title VII

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

principle that employees are not required to exhaust employer grievance procedures before bringing suit on discriminatory employment actions.

The "tangible employment action" limitation on the *Ellerth/Faragher* affirmative defense allows an employee who has suffered sexual harassment that culminates in a tangible employment action to join in a single Title VII lawsuit both her discriminatory employment action claim and her sexual harassment claim.

II. Constructive discharge is a "tangible employment action" within the meaning of the *Ellerth* and *Faragher* opinions. Constructive discharge is the functional equivalent of formal discharge in terms of the economic injury inflicted upon the employee. And, the Title VII law treats constructive discharge as the legal equivalent of formal discharge. Constructive discharge is, therefore, the sort of employment action that may be redressed by invoking Title VII's enforcement procedures without first exhausting employer grievance procedures.

ARGUMENT

The question here is whether a defendant-employer in a Title VII lawsuit can raise the affirmative defense delineated in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), where the plaintiff-employee proves that sexual harassment by her supervisor has culminated in the employee's constructive discharge.

We submit that just as—and for the same reasons—the *Ellerth/Faragher* affirmative defense is *not* available in suits on sexual harassment that culminates in a formal "discharge," *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 808, the *Ellerth/Faragher* affirmative defense is *not* available in suits on sexual harassment that culminates in a constructive discharge. The *Ellerth/Faragher* affirmative defense is not

available in suits on discriminatory "tangible employment actions"—*viz.*, in suits on employment actions that affect the plaintiff-employee's employment status in a way that causes her economic injury. And, like a discriminatory formal discharge, a discriminatory constructive discharge is a "tangible employment action."

I. (a) Under this Court's decisions in *Ellerth* and *Faragher*, "an employer may be held liable under Title VII of the Civil Rights Act of 1964 for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination." *Faragher*, 524 U.S. at 780 (citation omitted).

After carefully considering "the agency principles of vicarious liability for harm caused by misuse of supervisory authority," the Court concluded that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

While that conclusion sufficed under common law liability principles, the Court did not leave the matter at that point. Instead, in order to "accommodate the agency principles" with "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," the Court formulated a limited "affirmative defense" for Title VII hostile workplace cases. *Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807.

The "necessary elements" of this affirmative defense—which the defendant-employer is required to plead and prove—are: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective

opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

(b) Of pivotal importance here, the Court went on to specify that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

The critical operative term in delineating the scope of the affirmative defense is "tangible employment action." For Title VII purposes generally, a tangible employment action is one that inflicts "injuries of an economic character" that Title VII redresses by according the plaintiff-employee "make whole" relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 419 (1975). *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21(1993) (""economic" or "tangible" discrimination""). And, the term is obviously used in this sense in *Ellerth* and *Faragher*.

As the *Ellerth* Court put it, "a discriminatory act results in a tangible employment action" where "the plaintiff can show that she suffered an economic injury from her supervisor's actions." *Ellerth*, 524 U.S. at 760 (quotation marks and citation omitted). *Ellerth* expands on this point by listing examples whose common characteristic is that the employment action inflicts an economic injury on the employee: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 524 U.S. at 761. *Ellerth* then contrasts, as actions that are *not* tangible employment actions, "demotion without change in pay, benefits, duties, or prestige" and a "reassignment to [a] more inconvenient job," i.e., examples whose common characteristic is that the action does not inflict an economic injury. *Id.*

In other words, as *Faragher* adds, the affirmative defense is not available where the employee sues on "employment actions with tangible results." *Faragher*, 524 U.S. at 790.[2]

The availability of the *Ellerth/Faragher* affirmative defense, then, turns on whether the plaintiff-employee sues on an employment action that causes the employee economic injury or sues on an employment action that does *not* cause her economic injury but rather "other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" for which "the pre-1991 version of Title VII provided no compensation," *Commissioner v. Schleier*, 515 U.S. 323, 335 (1995) (quotation marks and citation omitted).

(c) The *Ellerth* and *Faragher* opinions do not elaborate a rationale for drawing this line of demarcation or for setting this limit on the availability of the affirmative defense. But the logic of the Court's ruling is sufficient in itself to reveal the rationale. To borrow the Court's explanation of the basis

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[2] The Brief for the United States argues that "a tangible employment action" is "an official act of the enterprise, a company act" and defines "official act" as a formal exercise of supervisory authority of the sort that would be "documented in official company records" and carried out through "use [of the company's] internal processes." U.S. Br. 19-20, quoting *Ellerth*, 524 U.S. at 762. The *Ellerth* opinion offers a different definition of that term. *Ellerth* treats the term "official act" as synonymous with "company act," 524 U.S. at 762, and explains that the term "company acts" describes "acts that significantly alter the terms or conditions of employment," *id.* at 750, quoting *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 515 (7th Cir. 1997)(Posner, C.J., dissenting). By this definition, an "official" or "company" act is any act that "significantly alter[s] the terms or conditions of employment," i.e., an act that has economic consequences, regardless of whether it is effected through the enterprise's formal processes.

for the affirmative defense itself, the limit on its availability "accommodate[s]" the defense's promotion of employer grievance procedures to "Title VII's equally basic policy" of providing employees who are the victims of economically harmful employment discrimination direct, unconditional access to Title VII's remedial procedures. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

In its operative terms, the *Ellerth/Faragher* affirmative defense introduces into the Title VII enforcement scheme a wholly novel requirement that employees attempt to remedy certain forms of employment discrimination through employer complaint procedures before resorting to the statutory enforcement procedures. *Ellerth* and *Faragher* do so by providing that "proof that an employer had promulgated an antiharassment policy with complaint procedure" that was "suitable to the employment circumstances" will generally establish the first element of the affirmative defense. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. And, "showing an unreasonable failure to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the employer's burden under the second element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-808.

Ellerth and *Faragher* introduce this exhaustion requirement against a background formed by the bedrock Title VII principle that an employee who has suffered a discriminatory tangible employment action, such as "a discharge, demotion, or undesirable reassignment," *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 808, has the right to invoke Title VII's statutory procedures for redress of that wrong without exhausting any employer complaint procedure. As this Court has stressed, "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). The primacy accorded

Title VII's remedial procedures is such that the period for filing Title VII charges on discriminatory "discharge[s], demotion[s], or undesirable reassignment[s]" will not even be tolled while an employee pursues an employer grievance procedure. *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-240 (1976).

"When a plaintiff proves that a tangible employment action resulted from . . . a supervisor's sexual [harassment], he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Ellerth*, 524 U.S. at 753-754. Where a supervisor's sexual harassment culminates in such a "discrete retaliatory or discriminatory act," the employee must initiate her Title VII action "within either 180 or 300 days of the date of the act or lose the ability recover for it." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). That being so, the *Ellerth/Faragher* affirmative defense is made unavailable in suits on sexual harassment culminating in tangible employment actions to assure that employees who suffer such employment discrimination—like all employees who suffer employment discrimination that inflicts economic injury—continue to have the right to seek Title VII redress free of any requirement to exhaust employer grievance procedures.

In this regard, *Ellerth* and *Faragher* provide that an employee who has suffered sexual harassment that culminates in a discriminatory tangible employment action has the right to bring suit on the tangible employment action and on the sexual harassment that preceded that action without first exhausting any employer sexual harassment grievance procedure. Nothing less would be sufficient to vindicate the employee right to such Title VII redress for the discriminatory tangible employment action, for the claim that the employment action was discriminatory and the claim that the action was preceded by and was the culmination of

supervisory sexual harassment are inextricably intertwined. Indeed, the sexual harassment preceding the tangible employment action will often constitute the principal evidence that the action was discriminatory. *See Ellerth*, 524 U.S. at 753-754. Since the parties will be in court on the culminating employment action and since the question of whether sexual harassment occurred will of necessity be litigated, *Ellerth* and *Faragher* contemplate a suit joining the claim on the sexual harassment and the claim on the culminating tangible employment action. *See Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 436-437 (1997).

II. Like a formal discharge, a constructive discharge is a "tangible employment action" within the meaning of *Ellerth* and *Faragher*.

(a). A formal discharge is self-evidently an employment action that makes an economically harmful change in the employee's employment status. Thus, an employee who suffers a discriminatory formal discharge has a direct, unconditional right to bring a Title VII suit on the discharge. And, for Title VII purposes, a formal discharge and a constructive discharge are functional equivalents.

"The general rule" under Title VII "is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee." *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975). It is beyond question that such a constructive discharge, like a formal discharge, makes an economically harmful change in the employee's employment status. And, that being so, a discriminatory constructive discharge is actionable under Title VII on the same basis as a discriminatory formal discharge. "Thus, just as an employer is liable under Title

VII when it discharges an employee on the basis of sex, the employer is likewise liable when, because of the individual's sex, the employer creates conditions of employment that effectively force the employee to resign." U.S. Br. 12.

It could not be otherwise. To take a particularly clear example, where an employer threatens an employee with discharge but offers her the chance to tender a resignation instead, the law does not treat the compelled resignation as any different than a discharge. And, if the employer compels the employee to resign under threat of discharge because of her sex, that compelled resignation is treated as an actionable wrong just as the formal discharge because of sex would have been.

In the instant case, the respondent, Nancy Drew Suders, alleges that her employer, the Pennsylvania State Police, compelled her resignation by taking her into police custody on baseless charges of theft from a workplace locker room. Pet. App. 12a. Surely, such a compelled resignation is the legal equivalent of a formal discharge.

Ms. Suders alleges, too, that her false arrest was the culmination of her supervisors' course of sexual harassment and that her constructive discharge was violative of Title VII and actionable as such. Such a discriminatory constructive discharge is the legal equivalent of a discriminatory formal discharge. *See Ellerth*, 524 U.S. at 753-754.

(b) In the instant case, the constructive discharge was caused by a discrete precipitating event, i.e., the allegedly false arrest. Even where there is not such a discrete precipitating event, e.g., where the constructive discharge has been caused by the hostile work environment created by supervisor sexual harassment, allowing the plaintiff-employee to join both her discriminatory constructive discharge claim and her hostile workplace claim is entirely compatible with

the *Ellerth/Faragher* "policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807.

As the Third Circuit stated, "a plaintiff claiming constructive discharge must demonstrate that the alleged discrimination surpasses a threshold of intolerable conditions," and "intolerability is assessed by the objective standard of whether a reasonable person in the employee's position would have felt *compelled* to resign,—that is, whether he would have had no choice but to resign." Pet. App. 23a (quotation marks, brackets, ellipses and citation omitted; emphasis in original). Thus, in determining whether a constructive discharge has occurred "it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning." *Id.* at 25a.

Where an employee claims that supervisor sexual harassment itself compelled her resignation, "it may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs." Pet. App. 58a. And, "[w]here a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 78 (1986) (Marshall, J., concurring).

In short, the constructive discharge law itself "encourag[es] forethought by employers and saving action by objecting employees" with respect to sexual harassment that results in a hostile workplace. *Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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